

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: October 25, 2005

GSBCA 16720

LARRY J. McKINNEY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Larry J. McKinney, pro se, Owensville, IN.

Judith A. Bonner, Office of Regional Counsel, General Services Administration, Philadelphia, PA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **GOODMAN**.

DANIELS, Board Judge.

Larry J. McKinney, who purchased an automobile from the General Services Administration (GSA), seeks a partial refund of the price he paid for the car. GSA's contracting officer denied Mr. McKinney's claim, and the agency now moves for summary relief of his appeal of the contracting officer's decision. Even if we accept all of Mr. McKinney's factual assertions, he cannot prevail. We therefore grant the motion, denying the appeal.

Background

In June 2005, GSA made available for purchase through its GSAAuctions website a 2003 Toyota Prius automobile. The on-line catalog described the car as follows:

ONE LOT CONSISTIN[G] OF VEHICLE, MFG TOYOTA, MDL 2003
PRIUS HYBRID, VIN [number], CYL, MI 26, 4 DOOR, *BY
BIDDING, THE PURCHASER UNDERSTANDS THAT THIS VEHICLE IS

SOLD FOR SALVAGE ONLY AND IS NOT REPAIRABLE FOR HIGHWAY USE.[1]

The catalog also contained a photograph of the vehicle, taken from the rear. The catalog stated that the car was located in Buffalo, New York, and that its custodian was Russell Millemaci. Exhibit 3.

The car was available for bid only by persons who accepted the terms and conditions of sale which were posted on the website. The terms and conditions included the following paragraphs:

Photographs. Photographs may not depict an exact representation of the bid item(s) and should not be relied upon in place of written item descriptions or as a substitute for physical inspection. Please contact the custodian for inspection dates and times.

Inspection. Bidders are invited, urged and cautioned to inspect the property prior to bidding. Bidders must contact the custodian indicated in the item description for inspection dates and times.

Oral Statements and Modifications. Any oral statement or representation by any representative of the government, changing or supplementing the offering or contract or any condition thereof, is unauthorized and shall confer no right upon the bidder or purchaser. . .
.

Description Warranty. The Government warrants to the original purchaser that the property listed in the GSAAuctions.gov website will conform to its description. If a misdescription is determined before removal of the property, the Government will keep the property and refund any money paid. If a misdescription is determined after removal, the Government will refund any money paid if the purchaser takes the property at his/her expense to a location specified by the Contracting Officer following the Refund Claim Procedure described below. No refunds will be made, after property is removed, for shortages of individual items within a lot. **This warranty is in place of all other guarantees and warranties, expressed or implied.**

The Government does not warrant the merchantability of the property or its purpose. The purchaser is not

¹ An exhibit in the appeal file explains that this was a "U.S. Dept. of Transportation crash-test vehicle[] that ha[d] been destroyed in testing." Exhibit 1. (All exhibits are part of an appeal file submitted by GSA in this case.)

entitled to any payment for loss or profit or any other money damages - special, direct, indirect, or consequential.

Refund Claim Procedure. To file a refund claim for misdescribed property, (1) submit a written notice to the Contracting Officer within 15 calendar days from the date of removal that the property was misdescribed, (2) maintain the property in the purchased condition until it is returned, and (3) return the property at your own expense to a location specified by the Contracting Officer.

Refund Amount. The refund is limited to the purchase price of the misdescribed property.

Exhibit 2.

GSA awarded the car to Mr. McKinney on July 5, 2005, noting that the bid price was \$2188. Exhibit 4. The contracting officer allowed Mr. McKinney to pay for the car as late as July 13. Exhibit 6. On July 12, Mr. McKinney told him in an electronic mail message, "We have discovered that this vehicle is in far worse condition than originally thought. The interior is almost completely shot. We, therefore, wish to rescind our offer on this vehicle." Exhibit 7. The contracting officer responded, "Per our terms and conditions, we do not warrant the condition of our property. We warrant only our description and your e-mail makes no claim with respect to our item description." He told Mr. McKinney that if he did not promptly pay for the vehicle, he would be "placed in default for non-payment." Exhibit 8. Mr. McKinney then paid for the vehicle. Exhibits 9, 10.

On July 26, Mr. McKinney sent the following electronic mail message to a GSA property disposal specialist:

Prior to bidding, we spoke with the custodian, Russ Millemaci, and [were] told that this was a rear-end collision, and that the front end was intact. Upon picking up the vehicle yesterday in Buffalo, NY, we found out that this was not the case. The front end was disassembled and missing bumper, air dam, bumper cushion and miscellaneous front end parts. This was a major reason we purchased this vehicle, for these parts, and gave \$2188 for it. The value of this vehicle is greatly diminished by the omission of these parts. We respectfully request a refund of \$1500 due to the misrepresentation of the condition of this vehicle. Only a picture of the rear damage was listed with the sale, so we had to depend on the statement of the custodian. Attached is a picture of the front end disassembled.

Exhibit 12.

On the following day, Mr. McKinney amplified his statement as to communications with the property custodian: "When I picked the vehicle up, Russ told me the front end parts were in the car, which they were not. . . . I am not asking for a full refund; just an appropriate adjustment of \$1500 because of merchandise that we were represented we would receive and did not." Exhibit 14.

In response to the motion for summary relief, Mr. McKinney has expanded further on this matter:

I was rushed to move the vehicle due to Mr. Millemaci being on jury duty and having to meet him in the evening, so I did not have time to take everything out of the vehicle to inspect it. I relied on the word of the property custodian that all the parts were there, as stated on the telephone and in person at the time of pickup. I did not realize parts were missing until I returned home and was able to remove all the parts from inside the vehicle.

Response to Motion for Summary Relief (Oct. 13, 2005).

On July 27, the contracting officer responded to Mr. McKinney's concerns:

I have determined it inappropriate to grant a full refund. The item description made no mention of the particular parts that you reference in your e-mail, such as the bumper and the air dam. Therefore, the description warranty does not apply. As for the pictures, they are not to be relied on in place of the written description. They are also no substitute for a physical inspection, which would have revealed any front end damage. Lastly, any supplemental verbal information provided to you by any official other than the Sales Contracting Officer is unauthorized and does not alter the Government's offer.

Exhibit 13; see also Exhibit 15 (contracting officer's electronic mail message of July 28 reiterating that "a misdescription did not occur" and a price adjustment was not appropriate). On August 2, the contracting officer issued a formal decision denying any refund. Exhibit 16. Mr. McKinney appealed the decision on August 10.

Discussion

Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating

the absence of genuine issues of material facts. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Under these standards, we accept as true, for the purpose of resolving GSA's motion for summary relief, all that Mr. McKinney says about the condition of the car he purchased and the statements made to him by its custodian while under Government control, Mr. Millemaci. We consider whether, assuming these statements to be true, he is entitled to the relief he seeks - a refund of part of his purchase price.

GSAAuctions, like other on-line auctions, are governed by rules prescribed by the organization which conducts them. The rules of this auction are contained in the terms and conditions promulgated by GSA. When GSA accepted Mr. McKinney's bid, these rules became the terms and conditions of a contract between the agency and the buyer. *Darren R. Gentilquore v. General Services Administration*, GSBCA 16705, slip op. at 4 (Oct. 20, 2005). We find, based on our reading of these rules, that the contracting officer's understanding of them was correct and Mr. McKinney's is not.

Mr. McKinney maintains that he is entitled to rely on the auction catalog photograph of the vehicle he purchased, coupled with the custodian's description of it. The terms and conditions of the auction, however, made plain that a prospective bidder could not rely on either photographs or oral statements of government representatives as to the condition of an item offered for sale. Actual physical inspection of such items was recommended and invited by the agency. Mr. McKinney did not make such an inspection. See *Danny R. Mitchell v. General Services Administration*, GSBCA 16209, 04-1 BCA ¶ 32,551, at 160,995.

Mr. McKinney also maintains that the vehicle was misdescribed. The terms and conditions do warrant "that the property listed in the GSAAuctions.gov website will conform to its description." The description on the website may have been incomplete, but it was not a misdescription. A misdescription is an inaccurate - meaning an erroneous or wrong - description of something with which the describer is familiar. Webster's Third New International Dictionary 1143 ("misdescribe," "misdescription") (1986); see also id. 1139 ("inaccurate"), 2642 ("wrongly"). The website said only that the vehicle was a 2003 Toyota Prius hybrid with a certain vehicle identification number and four doors; that the car had been driven 26 miles; and that it was not repairable for highway use. Mr. McKinney does not allege that any element within this description is inaccurate. Thus, the website description - the only thing that GSA warranted - was not a misdescription. See *Kenneth G. Hanke v. General Services Administration*, GSBCA 14097, 97-2 BCA ¶ 29,247, at 145,490-91.

Mr. McKinney finally asks for a refund of a part of his purchase price, to reflect the reduced value of the vehicle compared to what he expected. Even if we had found a misdescription, however, we could not grant this form of relief. The terms and conditions of the auction do not provide for partial refunds. See *Dan Parish v. General Services Administration*, GSBCA 16025, 03-1 BCA ¶ 32,211, at 159,304.

Decision

The appeal is **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge